

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JORDEN ANTHONY POWELL,

Defendant-Appellant.

UNPUBLISHED

February 4, 2014

Nos. 310439; 310440

Macomb Circuit Court

LC Nos. 2011-001982-FH;
2011-002176-FC

Before: MURPHY, C.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

In Docket No. 310440, defendant appeals as of right his jury trial conviction of conspiracy to commit first-degree murder, MCL 750.157a; MCL 750.316. The trial court sentenced defendant to life imprisonment with the possibility of parole on the conspiracy conviction. Defendant also filed a claim of appeal in Docket No. 310439 pertaining to his jury trial conviction of first-degree home invasion, MCL 750.110a(2). The trial court sentenced defendant to 30 to 240 months' imprisonment for the home invasion conviction. The convictions arose out of the same jury trial, and defendant filed one appellate brief covering both convictions and docket numbers. We affirm.

This case stems from a conspiracy involving Mallorie Wilson-Strat, Christina Sears, Kevin Sears, David Clark, and defendant to have Kevin Sears's wife murdered. Wilson-Strat was the girlfriend of Kevin Sears at the time, and Christina Sears is Kevin's sister. Kevin Sears and his wife were in the process of obtaining a divorce when the conspiracy developed. Defendant and Clark were solicited by Wilson-Strat to commit the murder, with Christina Sears approving of the solicitation. Defendant and Clark failed to carry out the murder, as planned, during a home invasion of the victim's house after Wilson-Strat dropped them off at that location. Defendant and Clark were thwarted by a child-proof bedroom door handle and then left the victim's home, taking her purse and dropping a knife along the way, before being picked up by Wilson-Strat. However, the conspiracy to murder Kevin Sears's wife continued, but fortunately an undercover officer became involved through an anonymous individual. And the officer was solicited by Wilson-Strat to commit the murder, again with the approval of Christina Sears. The undercover officer's involvement eventually led to the arrest of those involved in the conspiracy, including defendant. Wilson-Strat was tried and convicted of first-degree home invasion, solicitation of murder, MCL 750.157b(2), and conspiracy to commit first-degree

murder, and this Court recently affirmed her convictions. *People v Wilson-Strat*, unpublished opinion per curiam of the Court of Appeals, issued November 19, 2013 (Docket Nos. 310877 and 310879). Clark and Christina Sears were tried jointly before a single jury; Christina was convicted of solicitation of murder and conspiracy to commit first-degree murder, and Clark was convicted of the same crimes as defendant. Kevin Sears is awaiting trial. Wilson-Strat was a key prosecution witness against Christina Sears, Clark, and defendant.

I. JURY INSTRUCTIONS

Defendant first argues that the trial court erred in failing to instruct the jury that it should view Wilson-Strat's testimony, which constituted accomplice testimony, with caution, as reflected in CJI2d 5.6. Defendant expressly approved the instructions as given. Thus, defendant waived appellate review of his instructional argument. *People v Reid (On Remand)*, 292 Mich App 508, 515; 810 NW2d 391 (2011).

II. INEFFECTIVE ASSISTANCE

Defendant argues that trial counsel was ineffective because counsel did not request the cautionary instruction regarding accomplice testimony, CJI2d 5.6. Defendant contends that Wilson-Strat's testimony was outcome determinative and that there was no valid trial strategy in failing to request the accomplice instruction.

Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law, which we review, respectively, for clear error and de novo. *People v Grant*, 470 Mich 477, 484-485; 684 NW2d 686 (2004). To warrant reversal based on ineffective assistance of counsel, a defendant must overcome the strong presumption that counsel's performance constituted sound trial strategy and establish (1) that counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness, and (2) that the deficient performance prejudiced the defense, i.e., that a reasonable probability exists that, but for counsel's error, the result of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Defendant has failed to show that trial counsel's representation fell below an objective standard of reasonableness, nor has he established the requisite prejudice. Defendant's position at trial was that he never intended to kill Kevin Sears's wife; rather, he simply intended to squeeze as much money out of Wilson-Strat as possible, pretending to play along. In the context of that defense, the value of the cautionary accomplice instruction would have been minimal. Moreover, a significant portion of CJI2d 5.6 directs the jury to consider whether the accomplice's testimony was influenced by rewards, prosecutorial promises, or other self interests that may have resulted in fabricated testimony. Wilson-Strat did not receive any rewards for her testimony, nor was she the beneficiary of any plea agreement; therefore, a juror listening to CJI2d 5.6, had it been given, may have been more inclined to believe the account of events proffered by Wilson-Strat. On that note, and considering the other evidence of guilt against defendant, we cannot conclude that a reasonable probability exists that, but for any assumed error by trial counsel, the result of the proceeding would have been different. In further support of our conclusion that defendant was not prejudiced, the trial court generally instructed the jury

that when evaluating a witness's credibility, it should consider whether the witness had any bias, prejudice, or personal interest in the outcome of the case, whether there had been any promises that would affect how the witness testified, and whether the witness had any special reason to tell the truth or lie. In sum, reversal is unwarranted.

III. CONFRONTATION CLAUSE

Defendant argues that the admission of text messages sent from Clark to defendant violated his constitutional right of confrontation, where Clark did not testify and was thus not subject to cross-examination, and where the text messages did not fall within the ambit of MRE 801(d)(2)(E). Under MRE 801(d)(2)(E), a statement does not constitute hearsay if it is offered against a party and is "a statement by a coconspirator of [the] party during the course and in furtherance of the conspiracy on independent proof of the conspiracy."

The question whether a defendant was denied his constitutional right to confront witnesses against him is reviewed de novo. *People v Benton*, 294 Mich App 191, 195; 817 NW2d 599 (2011). In every criminal trial, the federal and state constitutions protect a defendant's right to be confronted with the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20. "The Confrontation Clause of the Sixth Amendment bars the admission of 'testimonial' statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness." *People v Walker (On Remand)*, 273 Mich App 56, 60-61; 728 NW2d 902 (2006). "'The right of confrontation insures that the witness testifies under oath at trial, is available for cross-examination, and allows the jury to observe the demeanor of the witnesses.'" *People v Watson*, 245 Mich App 572, 584; 629 NW2d 411 (2001), quoting *People v Frazier (After Remand)*, 446 Mich 539, 543; 521 NW2d 291 (1994). A statement "is testimonial if the declarant should reasonably have expected the statement to be used in a prosecutorial manner and if the statement was made under circumstances that would cause an objective witness reasonably to believe that the statement would be available for use at a later trial." *People v Dendel (On Second Remand)*, 289 Mich App 445, 453; 797 NW2d 645 (2010). On the other hand, statements are nontestimonial when they are "made informally to an acquaintance, not during a police interrogation or other formal proceeding . . . or under circumstances indicating that their 'primary purpose' was to 'establish or provide past events potentially relevant to later criminal prosecution.'" *People v Taylor*, 482 Mich 368, 378; 759 NW2d 361 (2008), citing *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004), and *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006).

In *Taylor*, 482 Mich at 377, our Supreme Court held that, "[w]hile nontestimonial statements are subject to traditional rules limiting the admissibility of hearsay, they do not implicate the Confrontation Clause." Here, Clark and defendant sent each other numerous text messages in which they discussed the home invasion and the ongoing conspiracy to kill Kevin

Sears's wife.¹ The text messages sent by Clark to defendant were simply not testimonial in nature. Thus, the Confrontation Clause was not implicated.

Further, with respect to the hearsay question, we find that the text messages fell within the parameters of MRE 801(d)(2)(E). Specifically, the text messages demonstrated that there remained a plot to kill Sears's wife, despite the earlier botched attempt, as reflected in this text by Clark, "Now I have to figure out how to f*****g do my job." A conspiracy continues "'until the common enterprise has been fully completed, abandoned, or terminated.'" *People v Martin*, 271 Mich App 280, 317; 721 NW2d 815 (2006) (citation omitted). Additionally, Wilson-Strat testified that she had further discussions with Clark after the home invasion "[t]o see if this job could get done," and she even gave Clark an extra \$100 for supplies. Clark's text messages qualified as statements by defendant's coconspirator during the course and in furtherance of the conspiracy, with there also being independent proof of the ongoing conspiracy. MRE 801(d)(2)(E). Moreover, even if MRE 801(d)(2)(E) was inapplicable, Clark's statements were clearly admissible under the hearsay exception for statements made by an unavailable declarant that are against penal interests. MRE 804(b)(3); *People v Barrera*, 451 Mich 261, 268-269; 547 NW2d 280 (1996).

Affirmed.

/s/ William B. Murphy
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood

¹ There is no dispute between the parties that the text messages sent from defendant to Clark were admissible.